KAMPAT TIMBER INDUSTRIES SDN. BHD.

v.

BENSA SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
ABU MANSOR ALI J
[COMPANIES WINDING-UP NO. 42-43 OF 1988]
27 APRIL 1989

COMPANY LAW: *Winding-up - Statutory notice - Section 218, Companies Act 1965 - Inability to pay debts - Authority of solicitor to sign statutory notice - Inclusion of interest and costs in notice - Whether notice was for an uncertain sum and in excess of actual amount due - Receipt of payment by creditor - Whether waiver of notice of demand - Section 211(2)(b) Companies Act 1965 - Discretion of Court to waive irregularities.*

This was a petition to wind up the respondent company on the ground of its inability to pay its debts. Statutory notice under s. 218 Companies Act was served, and the petitioner alleged that no payment has been received within the statutory period and prayed for winding up order against the respondent.

The respondent raised 4 objections, namely (a) that there was no evidence that the solicitors for petitioner had authority to sign the statutory notice, (b) that the inclusion of interests/ costs in the notice rendered it invalid, as it was a claim for an uncertain sum, (c) that the inclusion of interests/costs rendered the notice invalid because it was in excess of the actual amount due and (d) that the receipt of RM100 by the petitioner from the respondent before presentation of petition constituted a waiver of the notice of demand and the statement in the petition that "no payment had been received" was inaccurate. The supporting creditors list was for a sum of RM2.3 million.

Held:

[1] The statutory notice was copied to the petitioner and the petition was signed by the sales executive of the petitioner company and there was therefore sufficient evidence that issue of the statutory notice was authorised.

[2] The inclusion of interests/costs in the notice was a warning to the respondent, that if the demand was not met in due time then interest/costs would be incurred. Therefore, this is neither a claim for an uncertain sum nor is it a claim in excess of what was the actual amount due.

[3] The receipt of the sum of RM100 by the petitioner from the respondent before presentation of the petition and the statement in the petition that "no payment had been received" constituted an irregularity which could be waived by the Court in exercising its wide discretion under s. 221(2)(b) of the Companies Act 1965.

[4] The payment to the petitioner of sums of money after the lapse of the 21 days statutory period, did not *per se* constitute a waiver of the notice of demand and the question of waiver lies solely in the hands of the petitioner.

[Order accordingly to wind up respondent company.]

Cases referred to:

Teck Yow Brothers Hand-Bag Trading Company v. Maharani Supermarket Sdn. Bhd. [1989] 2 CLJ (Rep) 555

National Mutual Life Association of A/Asia Ltd. v. Oasis Developments Pty. Ltd. & Ors. 7 ACLR 758

Re Globe New Patent Iron & Steel Co. [1875] LR Vol 20

Legislation referred to:

Companies Act 1965, ss. 218, 221(2)(b)

For the petitioner - Ong Ban Chai; M/s. Ong Ban Chai & Co.

For the respondent - Harcharan Singh; M/s. Chong & Harcharan

JUDGMENT

Abu Mansor Ali J:

By their petition dated 3 April 1988 the petitioner applied for the winding up of the respondent on the ground of its alleged inability to pay its debts. The respondent opposed the said petition. After hearing arguments, I reserved judgment. I now give my judgment.

The facts of the case are as follows. The respondent is a company incorporated on 11 December 1982 with its registered office at No. 142-M, Jalan Loke Yew, Kuala Lumpur. The authorised capital of the company is 5 million divided into 5 million shares of one dollar each. The respondent's objects amongst others are to carry on the trade or business of builders and contractors etc.

The petitioner alleged that the respondent is indebted to the petitioner in the sum of RM8,099 being the balance of goods sold and delivered, full particulars of which had been given to the respondent.

On 24 February 1988, the petitioner's solicitors served the statutory notice under s. 218 of the Companies Act 1965 to the respondent to pay the amount but the petitioner alleges no payment has been received within the statutory period. Hence the petitioner filed this petition as the respondent is unable to pay its debts.

At the date of the hearing of this petition, the petitioner submitted that the notice served by them on the respondent is valid and regular as the sum demanded is ascertainable. In fact the petitioner says encl. (32) para. 4 the respondent by their letter dated 4 March 1988 tendered a sum of RM5,399.34 and RM100 costs which fell far short of the sum demanded which the respondent agreed to pay. In para. 6 of encl. (32) the petitioner says the sum of RM5,399.34 and RM100 were in fact only paid after 3 of the respondent's cheques were tendered and dishonoured on presentation. It was only after the cheques were dishonoured that the petitioner filed the petition. The petitioner's Counsel submitted the list of supporting creditors amounting to RM2.3 million encl. (48). Petitioner's Counsel submitted that in the present circumstances, there is a presumption of the company's inability to pay its debt. The company is therefore insolvent.

The petitioner's Counsel cited *Teck Yow Brothers Hand-Bag Trading Company v. Maharani Supermarket Sdn. Bhd.* [1989] 2 CLJ (Rep) 555. He also cited *National Mutual Life Association of A/Asia Ltd. v. Oasis Developments Pty. Ltd. & Ors.* 7 ACLR 758 which says if the Court determines that a company is insolvent, it is immaterial whether or not the debt is disputed and he also cited *Re Globe New Patent Iron & Steel Co.* [1875] LR Vol. 20 which states that the dishonour of bills is ample proof that the company is unable to pay its debt. He applied for a winding up.

The respondent opposed the winding up on three grounds. Firstly, he said there was no evidence that the plaintiff's solicitors had been duly authorised by the plaintiff to sign the statutory notice under s. 218 of the Companies Act. He cited *Mc Pherson on Winding up* p. 47 which says that the procedure must be strictly construed. A demand must be in writing signed by an authorised agent. Evidence, he submitted, is therefore required of the authority given to the solicitor to sign the statutory notice. He asked whethwer the solicitor of the petitioner had authority to sign annexture 2 Exhibit A?

I find this first point raised by the respondent to have no merit. I find the evidence is all there for us to see. In the first place the statutory notice is copied to the petitioner's client clearly showing the notice was sent with client's instruction. When the petition was duly filed, it was signed by the sales executive of the petitioner's company. I find there is sufficient evidence that the issue of the statutory notice was authorised.

I also find that the respondent's contention that the statutory notice was invalid on account of the fact that it was for an uncertain sum because of the inclusion of the demand for interest and costs to lack substance. He alleged there is no agreement between the parties to pay interest and since no preceding was then current, no question of costs arises. With respect, I am of the view it is a misreading of the notice as a whole. What the petitioner wished to say was in the event that the demand was not met in due time, the respondent would certainly be incurring costs and interest. I cannot find any defect in that statement. It is perfectly logical that the petitioner would be claiming for the items of interest and costs in the event the sum demanded remains unpaid. I cannot quarrel with the truth of that statement.

Respondent further alleged that because of these interest and costs, respondent urged the Court to say that the statutory notice is also not valid because it was in excess of the actual amount due. He cited *Deputy Commissioner of Taxation v. Cye International Pty. Ltd*. 10 ACLR 305 where it was held that the demand made in the tax notice was an additional sum over and above the amount due and that vitiates the demand for the payment of tax.

I find this case is irrelevant as I find that the costs and interest was not additional. The warning for the possible payment of costs and interest was proper and correct in the absence of settlement for if the matters were to proceed surely the respondent would have to pay costs and interest according to the nature of things.

Then I deal with the respondent's fourth ground that by the petitioner having received a payment of RM100 on 10 March 1988 before the presentation of the petition (1 April 1988) the respondent says it constituted a waiver of the notice of demand. Furthermore the petition stating in the notice "no payment had been received" was therefore inaccurate. Then apart from that, the petitioner had also received from the respondent sums on 21 May 1988 in substitution of the dishonoured cheques in para. 4(c)(ii) and (iii) of encl. (37). Respondent had kept the money till the date of hearing. No attempt was made by the petitioner to have the money returned. This according to respondent, constituted a waiver of the statutory notice.

As for respondent's allegation of a waiver, I cannot find any evidence of a waiver. The payment of the money was only made on 21 May 1988 when the statutory notice was dated 12 February 1988, the 21 days statutory period having long lapsed. The petitioner has the final say whether or not to waiver the notice in view of the evidence from the supporting creditors already in their hands. As for the irregularity of not acknowledging the RM100 accepted before the notice was issued, I agree with the petitioner's Counsel that the Court has wide discretion under s. 221(2)(b) of the Companies Act 1965 to waive irregularities. I do so now.

The respondent for reasons he assigned asked for the dismissal of the petition for winding up. I considered whether I should exercise my discretion to make an order for a winding up. As has been established and well settled, the sole issue before the Court is whether the respondent is unable to pay its debt and therefore should be would up. I am of the view on the facts before me, the evidence is overwhelming that the respondent is unable to pay its debts. In so determining, I am entitled to take into consideration contingent and prospective liabilities. The respondent has to pay RM 2.3 million consisting of supporting creditors. The objection taken before me is not that the respondent has the capacity to pay its debts. They were on other issues not central to the issue before me. I also find it is just and equitable that the respondent be wound up and I do make that order accordingly with costs to the petitioner and other supporting creditors to be taxed.

Also found at [1990] 1 CLJ 292